## ARIEF INSTITUTE SDN.BHD. v. TAN SRI DATUK ABDUL SAMAD BIN IDRIS

[S.C. (Salleh Abas L.P., George Seah & Syed Agil Barakbah S.C. JJ.) January 15 & March 9, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 194 of 1984]

*Trust – Application for vesting order – Dispute as to title – Trustee Act, 1949, s.48.*

In this case land had been alienated to (1) Abdul Samad bin Idris (2) Abu Bakar bin Lazim and (3) Haji Sulani bin Haji Taib as trustees for Arief Institute, Malaysia. Arief Institute was a firm registered by Siti Mariam binte Pilus and Raun bin Djalil Atmosumarto. Subsequently the appellant company was incorporated with Siti Mariam and Raun as the only subscribers. The appellant purported to pass a resolution that the appellant should take over all the assets and liabilities of Arief Institute. The appellant then asked the three trustees to convey the land to it. The respondent refused to do so. The appellant applied for a vesting order under section 48(g) of the Trustee Act, 1949. The application was dismissed by the trial judge and the appellants appealed. It was contended on behalf of the appellant that the application for the said land was made by the firm. The respondent however contended that the application was made by him and his co-trustees acting for and on behalf of a Board of Committee of Arief Institute Malaysia.

**Held:** the learned trial judge was correct in holding that the appellant had failed to prove to his satisfaction that they were entitled to require the respondent for a conveyance of the said land to them.

*Case referred to:*

(1) *Re Mills' Trusts* (1889) 40 Ch.D. 14.

SUPREME COURT.

*Sri Ram* for the appellant.
*Bakaruddin* for the respondent.

*Cur. Adv. Vult.*

**Seah S.C.J.** (delivering the Judgment of the Court): This is an appeal by Arief Institute Sdn. Bhd. (the appellant) against a dismissal of the learned Judge for a Vesting Order under section 48(g) of the Trustee Act 1949 (Revised – 1978 as Laws of Malaysia Act 208). It is common ground that on 9.3.71 Siti Mariam binti Pilus and Raun bin Djalil Atmosumarto registered a firm called Arief Institute under the Registration of Business Ordinance 1956 vide Certificate No. 156906. Subsequently, a company entitled Arief Institute Sdn. Bhd. was incorporated under the Companies Act 1965 vide Certificate No. 4134/77 on November 25, 1977, with Siti Mariam and Raun as the only subscribers. And on July 4, 1978 the Wilayah Persekutuan Land Authority alienated a parcel of land held under H.S. (D) 20367 Lot 15 Section 69 in the District of Wilayah Persekutuan in the town of Kuala Lumpur (hereinafter referred to as the said land) to (1) Abdul Samad bin Idris, (2) Abu Bakar bin Lazim and (3) Haji Sulani bin Haji Taib, as trustees for Arief Institute Malaysia, 70X Jalan Keramat Hujung, Kuala Lumpur. It seems not to be in dispute that the land premium of $200,219.00 appeared to have been paid by Arief Trading Sdn. Bhd.

On November 25, 1977 the appellant purported to pass the following resolution, viz:

"Resolved that the company, Arief Institute Sdn. Bhd. do take over all the assets and liabilities of Arief Institute with immediate effect."

Steps were taken to request all the three trustees to convey the said land to the appellant. It seems that two of the three trustees appeared to have signed the memorandum of the appellant but one trustee, Abdul Samad bin Idris (hereinafter called the respondent) failed to do so.

Now, section 48 provides that:

"In any of the following cases, namely –

(g) where a trustee jointly or solely entitled to or possessed of any interest in the land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, and has wilfully refused or neglected to convey the land or interest or release the right for twenty-eight days after the date of the requirement;

the court may make an Order (in this Act called a Vesting order) vesting the land or interest therein in any such person in any such manner and for any such interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that –

(A) where the contract is consequential on the appointment of a trustee the land or interest therein shall be vested for such interest as the court may direct in the persons who on the appointment are the trustees; and

(B) where the order relates to a trustee entitled jointly with another person, and such trustee is under disability or out of the jurisdiction of the court or cannot be found, or being a corporation has been dissolved, the land, interest or right shall be vested in such other person who remains entitled either alone or with any other person the court may appoint."

The first question to be considered was whether or not the appellant was a "person entitled to

require a conveyance of the said land"? The onus of establishing this lies on the appellant.

Learned counsel for the appellant submitted that in or about 1976 the application for the said land was made by the firm, Arief Institute. For the respondent, it was contended that the application was made by him and his co-trustees acting for and on behalf of a Board of Committee of Arief Institute Malaysia.

In our opinion, it would have been easy for the appellant to subpoena an officer of the Wilayah Persekutuan Land Authority to produce this application form and the question could have been resolved once and for all.

But they had not done so and no explanation had been put forward by learned counsel for the appellant for its non-production. We are not surprised that the learned Judge was constrained to hold that the appellant had failed to prove to his satisfaction that they were entitled to require the respondent for a conveyance of the said land to them. In *re Mills' Trusts*(1) it was decided by the English Court of Appeal that if the title of the person asking for the conveyance is disputed and the trustee entertains a *bona fide* doubt as to it, the trustee cannot be said to have wilfully refused or neglected to convey the said land.

For the above reasons, we are of the opinion that the judgment appealed from ought to be affirmed. The appeal is therefore dismissed with costs to the respondent to be taxed. The deposit to be paid to the respondent towards account of taxed costs.

*Appeal dismissed.*

Solicitors: *Sri Ram, Zulkifly & Kumar; Mutalib & Bakaruddin.*

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## TENGKU FARID BIN TUNKU HUSSAIN & ORS. v. UNITED ASIAN BANK BERHAD

**[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C.JJ.) January 15 & March 15, 1985]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 141 of 1984]**

*Contract – Guarantee – Whether guarantors have equity against creditor.*

*Banking Law – Guarantors – Whether have equity against creditor.*

In this case a company, the Pembagunan Farlim Sdn. Bhd., was developing a housing estate in Raub. For this purpose the company obtained a loan of $2 million from the respondent bank. The appellants who were directors of the company executed a guarantee for the loan and as a further security the land of the company upon which the housing estate was to be developed was charged to the bank. The project failed and the houses which were already built were neglected. All the 223 lots in the housing estate, except 78 of them were partially built and sold to members of the public. The remaining 78 were still vacant land but there was no evidence that they were not sold. The respondent bank took out a writ against the company claiming a total sum of $3,335,832.42 by way of principal and interest.

Subsequently the respondent took proceedings against the appellants on the guarantee. The appellants applied to the Court to stay the proceedings against them until after the Bank had foreclosed charges and realised their securities against the company. The application was refused and the appellants appealed.

**Held**: (1) although a guarantor has an equity against the creditor if he can show that the creditor is attempting to place the whole burden of the debt unfairly upon him but in this case the lands which were charged as a security for the loan were also sold to several purchasers and these purchasers too have equities. Between the equities of the appellants and the purchasers, the court shall protect those of the purchasers because theirs are the innocent ones;

(2) in the circumstances of this case the appellants as guarantors have no equity to prevent the respondent bank as creditor from proceeding upon the guarantee to recover the sum owing to them.

*Case referred to:*

(1) *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 M.L.J. 384.

SUPREME COURT.

*Ramesh Chandra Sanghvi* for the appellants. *Joginder Singh* for the respondents.

*Cur. Adv. Vult.*

**Salleh Abas L.P.** (delivering the Judgment of